EX PARTE OR LATE FILED

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November 3, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Docket No. 92-265 -- Ex Parte Presentation

Dear Mr. Caton:

This is to provide notice, pursuant to Section 1.1206 of the Commission's Rules, that the undersigned, as counsel Liberty Media Corporation and Southern Satellite Systems, Inc., made the attached written ex parte presentation to the addressee and copyees noted thereon.

Further, the undersigned made oral ex parte presentations to the following: Jill Luckett, Special Advisor to Commissioner Chong, on November 2; James R. Coltharp, Special Advisor to Commissioner Barrett, on November 3; and David H. Solomon, Assistant General Counsel - Administrative Law, and Stephen A. Bailey, Senior Attorney, on November 3. Today's ex parte presentations were made prior to release of the Sunshine Agenda. The presentations addressed the matters set forth in the attachment and its enclosure.

If you have any questions regarding this matter, please contact me.

Very truly yours,

Robert Hoegle

Robert L. Hoegle

RLH:ssm
Enclosure
cc: Jill Luckett, Esquire (w/encl.)
James R. Coltharp, Esquire (w/encl.)
David H. Solomon, Esquire (w/encl.)
Stephen A. Bailey, Esquire (w/encl.)

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November 3, 1994

FILED PRIOR TO RELEASE
OF THE SUNSHINE AGENDA

BY HAND

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Re: Ex Parte Presentation:
Petition for Reconsideration of
Commission's Denial of Additional
Damages Remedy, MM Docket No. 92-265

Dear Chairman Hundt:

Liberty Media Corporation ("Liberty Media") and Southern Satellite Systems, Inc. ("Southern"), the satellite carrier of WTBS, understand that the Commission is about to place on the Sunshine Agenda its review of the petitions for reconsideration filed in MM Docket No. 92-265, in which the Commission adopted rules implementing the program access and antidiscrimination provisions in Section 19 of the 1992 Cable Act. Liberty Media and Southern are concerned that, like themselves, other programmers and satellite carriers have deferred expressing their concerns on the issues raised in those petitions pending completion of the Commission's deliberations on the "going forward" rules.

We respectfully submit that the Commission should not interpret such silence as a lack of interest in the issues raised in those petitions. Liberty Media and Southern are particularly troubled by the request of the National Rural Telecommunications Cooperative ("NRTC") to award damages, attorney's fees, and "other necessary expenses" to "the successful complainant" in any program access discrimination case. As Liberty Media explained in its Opposition to NRTC's Petition (copy enclosed), in addition to the fact that the

Petition is procedurally defective, the damages remedy requested by NRTC was not authorized by the 1992 Cable Act; cannot be substantively or procedurally supported by the existing "streamlined" complaint process, which relieves complainants from showing any competitive harm; would raise difficult substantive and evidentiary issues in attempting to identify and quantify such damages; and is unnecessary because the existing rules are working. We have summarized each of these concerns below.

1. NRTC Had Not Requested And The 1992 Cable Act Did Not Authorize A Damages Remedy.

At the outset, NRTC's Petition for Reconsideration is procedurally defective. NRTC participated actively in the Commission's rulemaking proceeding, filing comments and reply comments. However, NRTC never proposed or supported a damages remedy in its original or reply comments -- its Petition for Reconsideration was an afterthought, requesting relief which it had not previously sought. Further, to the extent that other commenters had requested that the Commission assess damages for violations of its program access rules, NRTC's petition did not raise any new issues nor add any facts not already before the Commission when it rejected such remedy.

We respectfully submit that the Commission correctly decided that the 1992 Cable Act did not grant it "the authority to assess damages against a programmer" for violation of the program access provisions or the Commission's implementing rules. First Report and Order, MM Docket No. 92-265, 8 FCC Rcd. 3359 (1993) ("First Report and Order"), at ¶81. In contrast to the 1992 Cable Act, in each of the statutory provisions which NRTC cited to support a damages remedy (47 U.S.C. §§206, 207 and 209), Congress expressly authorized an award of damages. As Liberty Media explained in its Opposition to NRTC's Petition at 5-6, where Congress has provided other specific remedies but not damages, courts are reluctant to "read" a damages remedy into a statute. Further, as set forth below, the Commission has determined that complainants need not demonstrate competitive harm -- the linchpin of a damages award under common or statutory law -- in order to prove a violation of the Commission's program access/antidiscrimination rules.

2. The Existing Rules Will Not Substantively Or Procedurally Support An Award Of Damages.

At the urging of NRTC and other commenters, the Commission did "not impose a threshold burden of demonstrating some form of anticompetitive harm on a complainant alleging a violation of Section 628(c)." First Report at ¶49. Analogizing to requirements that licensees "keep their towers properly painted and lit," the Commission noted that "a violation occurs even if no one is damaged as a result of the licensee's failure to comply with our rules." Id. at ¶48 (emphasis added). Thus, the Commission concluded that "a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited." Id. (emphasis added).

Clearly, a remedy of damages, attorney's fees, or other costs would be inappropriate and insupportable where the Commission has relieved the complainant of any requirement to show that it has been injured in any way by the defendant's conduct and relies on the "potential for harm" to prohibit conduct. Such remedy not only would represent bad policy, but also would violate the due process rights of programmers. Finally, the "streamlined complaint process" adopted by the Commission so that complaints may "be resolved expeditiously" will not provide the necessary procedural protections or develop the kind of evidentiary record needed to support an award of damages. See First Report and Order at ¶17. In short, even if a damages remedy had been authorized, the addition of such remedy would require far-reaching changes in the Commission's rules.

3. Any Damages Remedy Would Ensnarl The Commission In Difficult Substantive And Evidentiary Issues.

Under the antidiscrimination statutes which NRTC offers as support for a damages remedy (47 U.S.C. §§202, 206, 207 and 209), it is well established that the appropriate measure of damages would not be the difference in the price paid by the complainant and the allegedly favored distributor, but rather the business lost by the complainant to the allegedly favored distributor:

> [The] difference between one rate and another is not the measure of damages.... The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

I.C.C. v. United States, 289 U.S. 385, 389-90 (1933); see also Illinois Bell Tel. Co. v. American Tel. & Tel. Co., 4 FCC Rcd. 5268, 5271 n.13, recon. denied, 4 FCC Rcd. 7759 (1989).

Of course, this is the very kind of competitive harm which the Commission has determined that complainants need not show to state a claim. Further, any attempt to quantify such alleged damages would pose a daunting task. For example, NRTC has represented to the Commission and to the courts that it does not compete with cable operators, but instead "seeks to serve areas where cable has not served and in all likelihood never will serve."[1] Comments of NRTC, filed in MM Docket No. 89-600 on March 1, 1990, at 4, 7. Thus, if the allegedly favored distributor were a cable operator, NRTC could not make the showing of competitive harm required to support an award of damages in any event.

4. The Existing Program Access/Antidiscrimination Rules Have Been Working.

The conduct of satellite cable programming vendors in which cable operators have an attributable interest since the Commission adopted its program access/antidiscrimination rules confirms the efficacy and adequacy of those rules. The program acquisition successes of DIRECTV provide perhaps the clearest example of how well the existing rules are working. As DIRECTV acknowledged in its Comments, filed in CS Docket No. 94-48 on June 29, 1994, at 5:

> DIRECTV also has been able to deal successfully with cable companies like Liberty Media Corporation, which has made clear its intent to sell DIRECTV its programming on reasonable terms and conditions in the manner envisioned by the 1992 Cable Act.

---

[1] NRTC confirmed in a Motion to Intervene as a Defendant filed in Time Warner Entertainment Co., L.P. v. F.C.C., CA No. 92-2494, on November 24, 1992 that it does not seek to serve areas already receiving cable service:

> NRTC and its members seek to provide television services to rural areas where more than 10,000,000 homes are presently unserved by cable and in all likelihood never will receive access to cable due to the expense of building cable facilities in those areas.

Memorandum of Points and Authorities in Support of the Motion of NRTC to Intervene as a Defendant at 6.

(emphasis added). Indeed, even those HSD packagers which have continued to complain about allegedly unjustified price differentials have acknowledged substantial price decreases in the cost of programming from numerous programmers in which cable operators have an attributable interest.

Finally, the high proportion of program access proceedings which have been terminated by settlement thus far suggests that the existing rules have balanced divergent interests, thereby encouraging settlement. In the context of these rules, which have imposed totally new and wide-ranging requirements on programmers requiring sometimes difficult judgments, a damages remedy would be particularly inappropriate and punitive and likely to destroy the existing balance.

* * *

We appreciate your consideration of our concerns on these important issues. If you have any questions on these issues, the management of Liberty Media and Southern would be pleased to address them and explain their positions in more detail subject to the constraints of the Commission's Sunshine period prohibition.

Very truly yours,

Robert Hoegle

Robert L. Hoegle
Counsel for Liberty Media Corporation
and Southern Satellite Systems, Inc.

Enclosure

cc: Commissioner Andrew C. Barrett (w/encl.)
Commissioner Rachelle B. Chong (w/encl.)
Commissioner Susan Ness (w/encl.)
Commissioner James H. Quello (w/encl.)
James L. Casserly, Senior Legal Advisor to Comm'r Ness (w/encl.)
James R. Coltharp, Special Advisor to Comm'r Barrett (w/encl.)
Jill Luckett, Special Advisor to Comm'r Chong (w/encl.)
Mary P. McManus, Legal Advisor to Comm'r Ness (w/encl.)
Maureen O'Connell, Legal Advisor to Comm'r Quello (w/encl.)
Merrill Spiegel, Special Ass't to Chairman Hundt (w/encl.)
Meredith Jones, Chief, Cable Services Bureau (w/encl.)
William H. Johnson, Acting Deputy Chief for Policy,
Cable Services Bureau (w/encl.)
William E. Kennard, Gen. Counsel (w/encl.)
David H. Solomon, Ass't Gen. Couns. - Administ. Law (w/encl.)
Stephen A. Bailey, Senior Attorney (w/encl.)
William Caton, Office of the Secretary (w/encl.)

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

LIBERTY MEDIA CORPORATION'S OPPOSITION TO THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE'S PETITION FOR RECONSIDERATION

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July 14, 1993

TABLE OF CONTENTS

SUMMARY

Liberty Media Corporation opposes the Petition for Reconsideration filed by the National Rural Telecommunications Cooperative ("NRTC") because NRTC fails to provide any new facts or other information to support its attempt to resurrect three arguments previously considered and rejected by the Commission.

First, NRTC claims that damages are the "traditional" remedy for violations of antidiscrimination provisions of the Communications Act, citing Section 202 and related provisions. Although several commenters sought a damages remedy, the Commission properly concluded that it did not have authority to assess damages for violations of Section 628. Moreover, NRTC previously stated that the Section 202 model, upon which it now relies to support its damages proposal, "is wholly inappropriate" for program access proceedings under the 1992 Cable Act.

Second, NRTC seeks to extend the prohibition of exclusive contracts between cable operators and vertically integrated programmers covering non-cabled areas to exclusive agreements between programmers and non-cable, multichannel video programming distributors. NRTC's suggestion is inconsistent with the fundamental purposes of the 1992 Cable Act, i.e. to limit the perceived market power of cable operators while minimizing interference with the programming marketplace and competition among non-cable distribution media.

Finally, NRTC contends that the Commission has "pre-judge[d]" certain issues regarding the costs incurred by satellite programmers in providing service to the customers of HSD distributors. In fact, the Commission simply has recognized the statutory and marketplace realities which result in higher costs to serve HSD customers. NRTC's repetition of its time-worn arguments cannot eliminate these higher costs.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

LIBERTY MEDIA CORPORATION'S OPPOSITION TO
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE'S
PETITION FOR RECONSIDERATION

Liberty Media Corporation ("Liberty Media"), pursuant to Section 1.429(f) of the Commission's Rules, hereby opposes the Petition for Reconsideration ("Petition") filed in this proceeding on June 10, 1993 by the National Rural Telecommunications Cooperative ("NRTC"). NRTC offers no new facts to support its attempt to resurrect three arguments previously considered and rejected by the Commission. Consequently, its Petition should be denied.

Preliminary Statement

Purporting to be "fighting on behalf of rural consumers for fair access to programming" (Petition at ¶11), NRTC seeks reconsideration of three issues addressed by the Commission in its First Report and Order in this proceeding, FCC 93-178 (rel. Apr. 30, 1993) ("First Report & Order").

First, NRTC contends that complainants in program access complaint proceedings should be entitled to recover damages, attorneys fees and "other necessary expenses." Petition at ¶¶14-16. Second, it seeks to extend the Section 628(c)(2)(C) prohibition on exclusive contracts between cable operators and vertically integrated programmers covering non-cabled areas to include exclusive agreements between programmers and non-cable distributors and to hold programmers liable for such exclusive contracts. Id. at ¶¶19-21. Finally, NRTC simply repeats its claims that the costs of providing satellite carriage to cable, MMDS and SMATV operators on one hand, and programming to HSD subscribers on the other, either "are exactly identical in all cases" or involve only "de minimis" differences and requests that the Commission reconsider any aspect of its First Report & Order indicating otherwise. Id. at ¶¶27-28, 30.

NRTC offers no new information to justify reconsideration of any of these issues. Several commenters urged that damages be recoverable, but the Commission properly concluded that it was not authorized to award damages in program access complaint proceedings. Moreover, NRTC previously stated that Section 202 of the Communications Act, upon which it now relies for its damages argument, is "wholly inappropriate" for program access cases. Contrary to NRTC's claims, the Commission's decision to limit liability for vio-

lations of Section 628(c)(2)(C) to cable operators is appropriate and consistent with the primary intent of the 1992 Cable Act to limit the perceived market power of cable operators. Finally, the cost arguments advanced by NRTC previously have been considered and rejected by the Commission.

I. The Commission Correctly Concluded That Damages Are Neither Authorized By The Act Nor Necessary For Its Effective Enforcement.

In its Notice of Proposed Rulemaking in this proceeding, FCC 92-543 (rel. Dec. 24, 1992), the Commission expressly solicited comments "on what...remedies would be deemed 'appropriate' for Section 628 violations" in addition to its "power to establish prices, terms and conditions of sale of programming." Id. at ¶49. Several commenters suggested that the Commission assess damages for violations of the program access rules. See First Report & Order, Appendix C at ¶112. However, after considering the record and the relevant statutory language, the Commission concluded that the 1992 Cable Act did not grant it "the authority to assess damages against the programmer or the cable operator" for violations of the program access provisions of the Act or the Commission's Rules implementing those provisions. Id. at ¶81; see also Section 76.1003(s)(1).

NRTC -- which never sought a damages remedy in its original or reply comments -- now asks the Commission to reconsider this conclusion because "[w]ithout the possibility

of an appropriate award of damages, program vendors have no incentive to discontinue their discriminatory pricing practices." Petition at ¶10. NRTC also asks the Commission to award attorneys fees "and other necessary expenses" to "the successful complainant" in any program access discrimination case. Id. at ¶¶14-16. However, such awards are unauthorized under the 1992 Cable Act; unnecessary to enforce the program access provisions of the Act and the Commission's Rules; and would constitute a financial windfall to NRTC with no corresponding public interest benefit.

A. The 1992 Cable Act Does Not Provide For Damages In Program Access Complaint Proceedings.

In now urging the Commission to add a damages remedy, NRTC claims that "[d]amages are traditionally regarded as 'an appropriate remedy' imposed by the Commission for violation of its nondiscrimination requirements." Petition at ¶8. As support for its "traditional" damages remedy, NRTC cites several sections of the Communications Act which expressly authorize damages against common carriers for violations of the antidiscrimination provisions of Section 202 of the Act. Id. However, NRTC previously stated in this proceeding that "[t]he Section 202 model is wholly inappropriate" for program access cases under the 1992 Cable Act. See NRTC Comments filed Jan. 25, 1993 at ¶39. Nevertheless, NRTC now relies on those same provisions to support a damages

remedy, completely ignoring the fact that they are applicable only to common carriers and differ significantly from the remedial provisions of Section 628(e).[1]

The Title II provisions cited by NRTC actually prove the opposite -- that, where Congress intended to authorize a Commission award of damages, it expressly did so. Section 206 provides that common carriers violating the non-discrimination requirements of Section 202 of the Act "shall be liable...for the full amount of damages sustained in consequence of any such violation...together with a reasonable counsel or attorney's fee." 47 U.S.C. §206. Section 207 states that "[a]ny person claiming to be damaged by any common carrier" may complain to the Commission or "bring suit for the recovery of the damages" incurred. Id. at §207. In any complaint brought before the Commission, the statute authorizes the Commission to determine whether the complainant "is entitled to an award of damages." Id. at §209.

In contrast, Section 628 does not render programmers or cable operators liable for damages, give complainants the right to sue for damages, or authorize the Commission to determine whether any complainant is entitled to damages.

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[1] Of course, the Commission already has found, after a detailed review of the underlying facts and circumstances, that the provision of programming by satellite carriers to customers of HSD distributors such as NRTC "falls outside the scope of Section 202(a) of the Act." National Rural Telecommunications Cooperative v. Southern Satellite Sys., Inc., 7 FCC Rcd. 3213 (1992) at ¶9.

Likewise, there is no language authorizing the award of attorneys fees or "other necessary expenses" to complainants alleging violations of Section 628. As courts have recognized consistently, "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 21 (1979) (citations omitted). Where, as here, Congress has provided a specific remedy, "it is an elemental cannon of statutory construction that...a court must be chary of reading others into it." Id. at 19.

NRTC's case for a damages remedy under Section 628 also is undermined by its own interpretation of the statute, which the Commission apparently adopted in part in its First Report & Order. Specifically, NRTC argued in its comments and replies in this proceeding that a complainant alleging a violation of the program access rules under Section 628(c) has no obligation to demonstrate that it has suffered "some type of specific 'harm'...caused" by the alleged violation. NRTC Comments at ¶24. In fact, NRTC asserted that the Commission was precluded under the statute from requiring any showing of harm. NRTC Reply Comments at ¶¶22-27. In its First Report & Order at ¶12, the Commission adopted NRTC's interpretation and concluded that complainants alleging violations of Section 628(c) need not "make a threshold showing that they have suffered harm as a result of the proscribed conduct."

Id. at ¶17. Clearly, an award of damages, attorney fees or other costs would be inappropriate where the complainant need not show that it has been injured in any way by the defendant's conduct.

B. Damages Are Unnecessary For Effective Enforcement Of Section 628.

NRTC also claims that damages should be awarded because "[f]ines alone will be an inadequate deterrent, and they will not benefit the video distribution market or make the aggrieved MVPD whole." Petition at ¶9. However, fines are neither the exclusive nor the primary remedy available to the Commission in program access cases. Rather, the Commission anticipates that the appropriate remedy in most cases will be "to order the vendor to revise its contract or offer to the complainant a price or contract term" not previously available. First Report & Order at ¶134. Further, the Commission has adopted a "streamlined complaint process" so that Section 628 complaints may "be resolved expeditiously." Id. at ¶17. Clearly, these remedial and procedural approaches are sufficient to promote "fair access to programming" by the "rural consumers" on whose behalf NRTC purports to act. NRTC never explains how the additional remedy it seeks -- the payment of money damages to NRTC -- would benefit those "rural consumers."

Of course, the Commission also has available the sanctions provided under Title V of the Communications Act, including substantial forfeitures for ongoing violations. See Section 628(e)(2). NRTC offers no support for its speculation that programmers "do not intend to comply with the Commission's new requirements" and will continue to engage in "discriminatory practices with impunity" in the face of these potential sanctions. See Petition at ¶12.

C. Damages As Envisioned By NRTC Would Serve Only To Enrich NRTC Unjustly.

Finally, NRTC fails to mention certain critical facts in its discussion of the damages which it purportedly has suffered as a result of the alleged difference between its wholesale programming costs and those of a small cable operator. See Petition at ¶13. First, although NRTC now claims that the alleged difference in wholesale prices "thwarts competition" (Petition at ¶13), NRTC previously has represented to the Commission that it does not compete with cable operators, but instead "seeks to serve areas where cable has not served and in all likelihood never will serve."[2] Com-

[2] More recently, NRTC again confirmed in a Motion to Intervene as a Defendant filed in Time Warner Entertainment Co., L.P. v. F.C.C., CA No. 92-2494, on November 24, 1992 that it does not seek to serve areas already receiving cable service:

> NRTC and its members seek to provide television services to rural areas where more than 10,000,000 homes are presently unserved by cable and in all

ments of NRTC filed in MM Docket No. 89-600 at 4, 7 (March 1, 1990). Consequently, NRTC would not be entitled to any damages under the applicable Section 202 standard, upon which NRTC relies to support its claim for a damages remedy. Under Section 202, the appropriate measure of damages would not be the difference in wholesale prices paid by NRTC and the allegedly favored distributor, but rather the business lost by NRTC to the allegedly favored distributor:

> [The] difference between one rate and another is not the measure of damages.... The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

I.C.C. v. United States, 289 U.S. 385, 389-90 (1933); see also Illinois Bell Tel. Co. v. American Tel. & Tel. Co., 4 FCC Rcd. 5268, 5271 n.13, recon. denied, 4 FCC Rcd. 7759 (1989). Thus, NRTC would not be entitled to damages in any event.

Moreover, while NRTC claims that the alleged wholesale price difference is "unfair to rural consumers," it claims that it is entitled to the alleged damages amounting to $150,000 per month, not the rural consumers who allegedly are victimized. Petition at ¶13. Thus, an award of damages as envisioned by NRTC would unjustly enrich NRTC in cases

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> likelihood never will receive access to cable due to the expense of building cable facilities in those areas.

Memorandum of Points and Authorities in Support of the Motion of NRTC to Intervene as a Defendant at 6.

where alleged price differentials have absolutely no competitive effect in the marketplace. Consequently, regulations providing for damages as requested by NRTC would be arbitrary and capricious and contrary even to the statutory provisions which it cites to support them.

II. The Commission Properly Limited Liability Under Section 628(c)(2)(C) To Cable Operators.

NRTC also seeks reconsideration of Section 76.1002(c)(1) of the Commission's Rules prohibiting a cable operator from engaging in any activity, including exclusive contracts with satellite cable or satellite broadcast programming vendors, which "prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programmer in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992." NRTC contends that "Congress did not intend Section 628(c)(2)(C) to apply only to conduct by a cable operator" and that, by limiting the implementing rule to cable operators, the Commission "will create a massive regulatory 'loophole.'" Petition at ¶¶19, 21. Specifically, NRTC claims that the Commission's rule will allow vertically integrated programming vendors to enter exclusive agreements

with non-cable multichannel video programming distributors for distribution to non-cabled areas. Id. at ¶21.

The limitation of Section 76.1002(c)(1) to cable operators is appropriate and consistent with Congressional intent. The Commission has recognized that the primary concern of Congress in enacting the 1992 Cable Act "is with the exercise of market power by cable system operators, and is not with ...those entities supplying cable programming, a market in which there is abundant and increasing competition." First Report & Order in MM Docket No. 92-266 (Rate Regulation), FCC 93-177 (rel. May 3, 1993), at ¶8. Thus, Congress directed the Commission to "avoid unnecessary constraints on the cable programming market." Id. Nevertheless, NRTC seeks to impose precisely such constraints through its expansive interpretation of Section 628(c)(2)(C).

The Commission repeatedly has acknowledged that exclusivity is a legitimate means of competition which benefits consumers and programmers:

> [E]xclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting. Exclusivity enhances the ability of the market to meet consumer demands in the most efficient way; this is a sufficient reason for allowing all media the same rights to enter into and enforce exclusive contracts.

Syndicated Exclusivity, 3 FCC Rcd. 5299, 5310 (1988), aff'd sub nom., United Video, Inc. v. F.C.C., 890 F.2d 1173 (D.C. Cir. 1989) (emphasis added); see also NTIA, Video Program

Distribution and Cable Television: Current Policy Issues and Recommendations, 107 (1988) (program exclusivity agreements "generally represent sound and legitimate business transactions creating benefits for both parties"). Thus, only where exclusive arrangements further the alleged exercise of market power by cable operators, which was the overriding Congressional concern, should the Commission seek to regulate such agreements under Section 628.

If NRTC or any other multichannel video programming distributor demonstrates that a particular agreement between a vertically-integrated programmer and a non-cable distributor regarding distribution to non-cabled areas involves the exercise of market power by the cable operator affiliated with that programmer, the rule provides for a remedy against that cable operator. Additional remedies directed at the programmer or the non-cable distributor are neither necessary for effective enforcement of the statute nor contemplated by its terms. Thus, the Commission acted properly in limiting Section 76.1002(c)(1) to cable operators, and it should reject NRTC's request to extend the rule to programmers.

III. The Commission Cannot Ignore Justifiable Cost Differences In Providing Satellite Programming To Customers Of HSD Distributors.

Finally, NRTC claims that by concluding that "services provided to HSD distributors may be more costly than services to other distributors," the Commission effectively

has "pre-judge[d] these and other related issues concerning the alleged costs...in providing service to HSD distributors." Petition at ¶¶25-27. In fact, the Commission simply has recognized the statutory and marketplace realities which NRTC continues to ignore.

For example, the Commission properly recognized that "additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security" when a satellite programmer provides service to the customers of an HSD distributor as opposed to a cable operator.[3] First Report & Order at ¶106. In contrast, NRTC continues to insist that these marketplace differences do not exist. For example, NRTC makes no mention of signal piracy among HSD owners, despite the fact that the Commission has concluded that at least one out of every two HSD owners steals programming. See Second Report at ¶40. While NRTC may consider a 50 percent theft rate "de minimis," Liberty Media submits that common sense dictates that a higher rate of theft will lead to higher prices, a fact repeatedly recognized by the Commission. Id. at ¶¶40, 48; First Report & Order at ¶106.

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[3] The Commission's conclusion is consistent with its prior determination that, "[n]otwithstanding NRTC's assertion to the contrary, it is evident that costs to serve HSD distributors are higher than costs to serve cable system operators." Inquiry into the Existence of Discrimination in the Provision of Superstation And Network Station Programming (Second Report), 6 FCC Rcd. 3312 (1991) at ¶46 ("Second Report").

Second, NRTC ignores fundamental differences in copyright law applicable to satellite broadcast programming provided to HSD owners (for which the satellite carrier pays copyright fees) versus retransmitted broadcast signals provided to cable operators (for which the cable operator pays the copyright fee). Instead, NRTC contends that the satellite carriers' costs "are exactly identical" in both cases. Petition at ¶28. NRTC simply disregards the fundamental difference in copyright law and claims that:

> Satellite carriers neither originate nor own these signals. They merely re-transmit them for HSD, cable, MMDS and SMATV distribution. The satellite carrier uplinks the same signal in the same scrambled format to the same satellite transponder for the HSD, cable, MMDS and SMATV wholesale distribution markets.

Id. (emphasis added). The Commission previously has recognized that this difference in copyright law leads to higher costs for satellite broadcast programmers serving the customers of HSD distributors. See Second Report at ¶¶27, 46. NRTC's unsupported assertions cannot change this fundamental fact.

Third, NRTC grudgingly admits that satellite carriers incur additional costs for use of the DBS Authorization Center in order to serve the customers of HSD distributors. Petition at ¶30. Nevertheless, NRTC claims that "[i]t is grossly inappropriate...for a programmer simply to add the HSD tier bit and activation data link costs to their wholesale

cable rates when 'justifying' rates to an HSD distributor." Id. at ¶31 (emphasis in original). However, the Commission already has found that allocation of these costs to HSD service is appropriate. See Second Report at ¶49. Thus, NRTC provides no basis for reconsideration of the cost issues raised in its Petition.

Conclusion

The issues raised by NRTC were fully considered and properly resolved by the Commission in its First Report & Order. Because NRTC has offered no new facts or information to justify reconsideration of these issues, its Petition should be denied.

Respectfully submitted,

July 14, 1993

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